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**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

**MUR: 6269**  
**DATE COMPLAINT FILED: April 07, 2010**  
**DATE OF NOTIFICATION: April 13, 2010**  
**DATE ACTIVATED: May, 06, 2010**  
**EXPIRATION OF SOL: March 11-25, 2013**

**COMPLAINANT:**

**Sam Lieberman**

**RESPONDENTS:**

**Tarkanian for Senate and Chrissie Hastie,**  
**in her official capacity as Treasurer**  
**Danny Tarkanian**  
**Mike Montandon for Governor**  
**Steve Wark**  
**Image and Design**

**RELEVANT STATUTES:**

**2 U.S.C. § 441a**  
**2 U.S.C. § 441b**  
**2 U.S.C. § 441i(f)(1)**  
**2 U.S.C. § 434(c)**

**INTERNAL REPORTS CHECKED:**

**FEC Disclosure Reports**

**FEDERAL AGENCIES CHECKED:**

**None**

**I. INTRODUCTION**

The complaint in this matter alleges that Mike Montandon for Governor used soft money on an Internet advertisement that opposed a federal candidate, Senator Harry Reid, in violation of Section 441i(f)(1) of the Federal Election Campaign Act of 1971, as amended ("the Act"). The complaint further alleges that the Internet advertisement was coordinated through the use of a common vendor, Steve Wark and Image and Design, and that therefore Mike Montandon for Governor made, and Senator Reid's then-potential general election opponent, Danny Tarkanian and Tarkanian for Senate, received, an in-kind contribution that

1 may have been paid for with funds that did not comply with the limitations and prohibitions  
2 of the Act. Finally, the complaint alleges that even if the Internet advertisement was not  
3 coordinated with a candidate or a political committee, Montandon for Governor failed to file  
4 an independent expenditure report with the Commission, in violation of 2 U.S.C. § 434(c).

5 In response, the Respondents argue variously that the complaint is based on wholly  
6 unsupported assumptions and inferences and upon a misapplication of relevant legal  
7 standards. Based on the generally *de minimis* costs associated with Internet communications,  
8 we recommend that the Commission exercise its prosecutorial discretion and dismiss the  
9 allegation that Mike Montandon for Governor used soft money on the advertisement at issue  
10 in violation of Section 441i(f)(1), *see Heckler v. Chaney*, 470 U.S. 821 (1985). Further, there  
11 appears to be no basis for concluding that Mike Montandon for Governor coordinated the  
12 Internet advertisement at issue with Tarkanian for Senate. Therefore, we recommend that the  
13 Commission find no reason to believe that Mike Montandon for Governor, Danny Tarkanian,  
14 or Tarkanian for Senate and Chrissie Hastie, in her official capacity as Treasurer, violated  
15 2 U.S.C. §§ 441a or 441b, or that Steve Wark and Image and Design violated the Act. In  
16 addition, we have no information suggesting that the cost of the advertisement at issue  
17 exceeded \$250, the threshold for filing an independent expenditure report. Thus, we  
18 recommend that the Commission find no reason to believe Mike Montandon for Governor  
19 violated 2 U.S.C. § 434(c). We also recommend that the Commission close the file.

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 **A. Background**

22 The complaint alleges that on or about March 18, 2010, Mike Montandon for  
23 Governor violated 2 U.S.C. § 441i(f)(1) by running an Internet advertisement opposing a

1 federal candidate. Complaint, pp. 2-3. The advertisement includes a picture of Senator Harry  
2 Reid, an incumbent candidate for the United State Senate from Nevada, along with his son, a  
3 Nevada gubernatorial candidate, and the following sentence: "Put an end to the Reid  
4 dynasty." Complaint, Attachment A. The following disclaimer also appeared on the  
5 advertisement: Paid for by Montandon for Governor. *See Id.*

6 The complaint asserts that the Internet advertisement violated 2 U.S.C. § 441i(f)(1)  
7 because it was a public communication, referred to Senator Reid and clearly opposed his re-  
8 election, and may have been paid for with funds that were not subject to the limitations and  
9 prohibitions of the Act. Complaint, p. 3. The complaint notes that Nevada state law permits  
10 corporate and labor unions to make contributions to candidates, and permits individual  
11 contributions of up to \$5,000 per election. *Id.*

12 The complaint further alleges that Mike Montandon for Governor made, and Senator  
13 Reid's then-potential general election opponent, Danny Tarkanian and Tarkanian for Senate,  
14 received, an illegal in-kind contribution because the advertisement was coordinated through  
15 the use of a common vendor. Complaint, p. 4. Specifically, the complaint asserts that an  
16 individual named Steve Wark, political consultant and president of Image and Design, works  
17 for both the Tarkanian and the Montandon campaigns, and that "it is likely that even if [Wark]  
18 did not help create this ad personally, he has conveyed material 'plans, projects, activities, or  
19 needs' of Tarkanian to the Montandon campaign." Complaint, p. 4-5. Finally, the complaint  
20 alleges that even if the advertisement was not coordinated with a candidate or a political  
21 party, Montandon for Governor should have filed an independent expenditure report with the  
22 Commission, but failed to do so, in violation of 2 U.S.C. § 434(c).

1 In response to the complaint, Tarkanian for Senate and Chrissie Hastie, in her official  
2 capacity as Treasurer, argue that the complaint provides no supporting documentation to  
3 demonstrate that: (1) the ad at issue is what it purports to be, or that it was in fact published  
4 and paid for by Montandon for Governor; (2) the ad was publicly distributed or disseminated  
5 in the clearly identified jurisdiction within 90 days of an election; (3) the ad was produced by  
6 Steve Wark, the alleged common vendor, or his agents, ~~or~~ with Wark's knowledge, advice,  
7 input or consent; (4) ~~or~~ that any information obtained from Tarkanian and used by the vendor  
8 in creating the advertisement was "material to the creation, production, or distribution" of the  
9 ad at issue, and was not obtained from a publicly available source. Tarkanian Response, pp.  
10 1-3.

11 Apparently responding on behalf of Mike Montandon for Governor, Mike Montandon  
12 states that he ran an advertisement that indicated that Rory Reid, one of his opponents in the  
13 race for governor of Nevada, was part of a "dynasty," in that he is related to his political  
14 father, incumbent Senate Majority Leader Harry Reid. Montandon Response, ¶ 2. The  
15 reference to a "dynasty," he says, was obviously a reference to a son of Harry Reid.  
16 Montandon Response, ¶ 3. He states that his new media advisors, Harris and Associates,  
17 created the advertisement and did not coordinate the ad with anyone other than himself and  
18 his campaign manager. Montandon Response, ¶ 2. Montandon further states that Steve Wark  
19 knew nothing of the ad and was not employed by his campaign after November 2009. *See Id.*

20 In his response, Steve Wark states that he ceased working for the Montandon  
21 campaign in November of 2009, and that the advertisement at issue was apparently created,  
22 paid for, and placed at least 120 days after he ceased working for the campaign. Wark  
23 Response, p. 1-2. He further states that he had no prior knowledge of the content, or the

1 placement, of the advertisement, and that he has never seen the advertisement in any form or  
2 medium, with the exception of the copy attached to the complaint. *Id.*, p. 1. In addition, he  
3 asserts that he never shared any of the plans, projects, activities, or needs of Tarkanian for  
4 Senate with the Montandon campaign. *Id.*, p. 2.

5 **B. Analysis**

6 **1. Allegation that Mike Montandon for Governor Used Soft Money to**  
7 **Oppose a Federal Candidate**

8  
9 Section 441i(f)(1) of the Act prohibits a candidate for State or local office, an  
10 individual holding State or local office, or an agent of such a candidate or individual from  
11 spending any funds for a communication described in 2 U.S.C. § 431(20)(A)(iii) unless the  
12 funds are subject to the limitations, prohibitions, and reporting requirements of this Act.  
13 Section 431(20)(A)(iii) defines the term 'Federal election activity' to mean, among other  
14 things, "a public communication that refers to a clearly identified candidate for Federal office  
15 (regardless of whether a candidate for State or local office is also mentioned or identified) and  
16 that promotes or supports a candidate for that office, or attacks or opposes a candidate for that  
17 office (regardless of whether the communication expressly advocates a vote for or against a  
18 candidate)."

19 The term "public communication" means a communication by means of any  
20 broadcast, cable, or satellite communication, newspaper, magazine, or any outdoor advertising  
21 facility, mass mailing or telephone bank to the general public, or any other form of general  
22 public political advertising. 11 C.F.R. § 100.26. The term "general public political  
23 advertising" shall not include communications over the Internet, except for communications  
24 placed for a fee on another person's Web site. *Id.*

1 Here, the available information reflects that the advertisement at issue was placed on  
2 The Drudge Report at <http://www.drudge.com> on March 18, 2010, and ran for two days. See  
3 [http://www.nevadanews bureau.com/2010/04/10/tarkanian-montandon-campaigns-named-in-](http://www.nevadanews bureau.com/2010/04/10/tarkanian-montandon-campaigns-named-in-nevada-state-democratic-party-fecomplaint)  
4 [nevada-state-democratic-party-fecomplaint](http://www.nevadanews bureau.com/2010/04/10/tarkanian-montandon-campaigns-named-in-nevada-state-democratic-party-fecomplaint). Available information also reflects that The  
5 Drudge Report charges for advertising. See <http://www.intermarkets.net>. Thus, it appears  
6 that the advertisement at issue was a public communication. The advertisement also refers to  
7 a clearly identified candidate for Federal office (Senator Reid) and arguably could be read to  
8 attack or oppose him by stating, "Put an end to the Reid dynasty," making Montandon's  
9 payment for the advertisement subject to the prohibition of Section 441i(f)(1) of the Act.  
10 We have no information regarding any specific costs associated with the advertisement at  
11 issue.<sup>1</sup> An investigation would be needed to clarify those costs.

12 However, we do not believe further use of Commission resources is warranted.  
13 Montandon's 2009 Annual Report, filed with the Nevada Secretary of State's Office and  
14 covering the period from January 1, 2009 through December 31, 2009, and its Contributions  
15 and Expenditures Report #1, covering the period from January 1, 2010 through May 27, 2010,  
16 do not reveal any payments to The Drudge Report or affiliated agencies for Internet  
17 advertising. Given that Nevada state law only requires itemization of expenditures that  
18 exceed \$100, it is possible that Montandon did not itemize payment for placing the ad because  
19 the ad cost less than \$100. See <http://www.leg.state.nv.us/NAC/NAC-294A.html>. As the  
20 costs associated with Internet communications are generally *de minimis*, particularly those  
21 placed for a fee on another website, see, e.g., MUR 5934 (Thompson), Factual and Legal  
22 Analysis at 5 (Google AdWords ad cost \$133), we recommend that the Commission exercise

<sup>1</sup> The current rates for advertising on The Drudge Report are not publicly available. The last published rates are seven years old, and, given the explosion in Internet advertising since then, are likely not reliable.

1 its prosecutorial discretion and dismiss the allegation that Mike Montandon for Governor  
2 violated 2 U.S.C. § 441i(f)(1). *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (in  
3 determining whether to pursue an enforcement action, an agency "must not only assess  
4 whether a violation has occurred, but whether agency resources are best spent on this  
5 violation or another . . . [and] whether the particular enforcement action request best fits the  
6 agency's overall policies . . .").

7 **2. Allegation That Mike Montandon for Governor Made, and Danny**  
8 **Tarkanian and Tarkanian for Senate, Received, a Coordinated**  
9 **Contribution**

10  
11 Under the Act, an expenditure made by any person "in cooperation, consultation, or  
12 concert, with, or at the request or suggestion of" a candidate constitutes an in-kind  
13 contribution. *See* 2 U.S.C. § 441a(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a). Commission  
14 regulations set forth a three-prong test to define when a communication is coordinated with a  
15 candidate. A communication is coordinated with a candidate or candidate committee when:  
16 (1) the communication is paid for by a person other than that candidate, authorized committee  
17 or agent thereof; (2) the communication satisfies at least one of the four "content" standards  
18 described in 11 C.F.R. § 109.21(c);<sup>2</sup> and (3) the communication satisfies at least one of the six  
19

<sup>2</sup> The "content" standard includes: (1) an "electioneering communication" defined at 11 C.F.R. § 100.29(a) as a broadcast, cable, or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within a specific time frame, and is targeted to the relevant electorate; (2) a "public communication" that disseminates campaign materials prepared by a candidate; (3) a communication that "expressly advocates" the election or defeat of a clearly identified federal candidate; and (4) a "public communication" that refers to a clearly identified candidate, is distributed 120 days or fewer before an election and is directed to a targeted audience. 11 C.F.R. § 109.21(c).

1 "conduct" standards described in 11 C.F.R. § 109.21(d). 11 C.F.R. § 109.21(a).<sup>3</sup>

2 Here, the complaint alleges that the conduct prong for coordination is satisfied based  
3 on a common vendor theory. The Commission's regulations provide that the conduct prong  
4 may be satisfied if the parties contracted with or employed a common vendor that used or  
5 conveyed material information about the campaign's plans, projects or activities or needs, or  
6 used material information gained from past work with the candidate to create, produce, or  
7 distribute the communication. 11 C.F.R. § 109.21(d)(4). The complaint, however, provides  
8 no specific information indicating that conduct showing coordination based on a common  
9 vendor theory occurred, and only speculates that the common vendor, Steve Wark, "very  
10 likely" used or conveyed to the payor information about the Tarkanian campaign's plans,  
11 projects, activities, or needs. See Complaint, p. 4-5. In contrast, the respondents  
12 unequivocally refute the complaint's unsupported allegations. In particular, Wark states that  
13 he left the campaign in November 2009, six months before the advertisement appeared, and  
14 had no prior knowledge of the content, or the placement, of the ad, had never seen the  
15 advertisement in any form or medium with the exception of the copy attached to the  
16 complaint, and never shared any of the plans, projects, activities, or needs of Tarkanian for  
17 Senate with the Mentwodon campaign. See Wark Response, p. 1-2. Similarly, Mentwodon for  
18 Governor states that Steve Wark knew nothing of the ad and was not employed by his

<sup>3</sup> The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the person paying for the communication employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the person paying for the communication republished campaign material. See 11 C.F.R. § 109.21(d).



1 campaign after November 2009. Montandon Response, ¶ 2. Thus, there appears to be no  
2 basis for concluding that Mike Montandon for Governor coordinated the Internet  
3 advertisement with Tarkanian for Senate through a common vendor, or otherwise.<sup>4</sup> Because  
4 the conduct prong has not been met, we recommend that the Commission find no reason to  
5 believe Mike Montandon for Governor, Danny Tarkanian, or Tarkanian for Senate and  
6 Chrissie Mastie, in her official capacity as Treasurer, violated 2 U.S.C. §§ 441a or 441b. In  
7 addition, we recommend that the Commission find no reason to believe Steve Wark and  
8 Image and Design violated the Act.

9 **3. Allegation that Montandon for Governor Violated the Act by**  
10 **Failing To File an Independent Expenditure Report**  
11

12 The complaint alleges that even if the advertisement was not coordinated, Montandon  
13 for Governor should have filed an independent expenditure report with the Commission, but  
14 failed to do so, in violation of 2 U.S.C. § 434(c). The term "independent expenditure" means  
15 an expenditure by a person for a communication expressly advocating the election or defeat of  
16 a clearly identified candidate that is not made in cooperation, consultation, or concert with, or  
17 at the request or suggestion of, a candidate, a candidate's authorized committee, or their  
18 agents, or a political party committee or its agents. 11 C.F.R. § 100.16.

19 The Act, however, assigns the reporting requirement to a person (other than a political  
20 committee) who makes independent expenditures in an aggregate amount or value in excess  
21 of \$250 during a calendar year. 2 U.S.C. § 434(c). The complaint did not provide, and we  
22 have no information suggesting, that the costs associated with the ad at issue were in excess of  
23 \$250, or that Montandon for Governor made any other independent expenditures during the

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<sup>4</sup> Montandon for Governor states that media advisors Harris and Associates created the advertisement and communicated only with Montandon and his campaign manager.


1 calendar year. In the absence of such information, and given the generally *de minimis* costs  
2 associated with Internet communications, *see* discussion *supra*, we recommend that the  
3 Commission find no reason to believe Montandon for Governor violated 2 U.S.C. § 434(c).  
4 We also recommend that the Commission close the file.

5 **III. RECOMMENDATIONS**

- 6 1. Find no reason to believe that Mike Montandon for Governor violated 2 U.S.C.  
7 §§ 441a, 441b, or 434(c), and dismiss the allegation that Mike Montandon for  
8 Governor violated 2 U.S.C. § 441i(f)(1);  
9  
10 2. Find no reason to believe Danny Tarkanian violated 2 U.S.C. §§ 441a or 441b;  
11  
12 3. Find no reason to believe Tarkanian for Senate and Chrissie Hastie, in her official  
13 capacity as Treasurer, violated 2 U.S.C. §§ 441a or 441b;  
14  
15 4. Find no reason to believe Steve Wark and Image and Design violated the Act;  
16  
17 5. Approve the Attached Factual and Legal Analyses;  
18  
19 6. Approve the appropriate letters; and  
20  
21 7. Close the file.  
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Thomasenia P. Duncan  
General Counsel

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27 8/18/10  
28  
29 Date

By:  by RAC  
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